**U.S. Department of Labor**

**Office of Administrative Law Judges**
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DATE: May 31, 2000

CASE N0.: 1999-CAA-00017
1999-CAA-00018

In the Matter of

**DONALD SURRETTE**
Complainant

v.

**FOSTER WHEELER ENVIRONMENTAL CORPORATION**

and

**EDWARD BLACK ASSOCIATES**
Respondents

Appearances:

Stephen L. Raymond, Esquire, Haverhill, Massachusetts, for the Complainant

Howard M. Radzely, Esquire (Wiley, Rein & Fielding), Washington, D.C., for the Respondent Foster Wheeler Environmental Corporation

Gerard J. Burns, P.E., Boston, Massachusetts, for the Respondent Edward Black Associates

Before: Daniel F. Sutton
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

### I. Jurisdiction

This case arises under the environmental whistleblower protection provisions of the Clean Air Act ("CAA"), 42 U.S.C. §7622, and the Comprehensive Environmental Recovery, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9610, and the regulations promulgated thereunder which are found at 29 C.F.R. Part 24. The matter is before the undersigned

Administrative Law Judge pursuant to the Complainant's request for a hearing. 29 C.F.R. §24.4(d).

## II. Procedural History

By letter dated April 6, 1999, Donald Surrette ("Complainant" or "Surrette") filed his complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA"), alleging that his employment, which had been contracted out to the Respondent Foster Wheeler Environmental Corporation ("Foster Wheeler") by the Respondent Edward Black Associates ("EBA"), was abruptly terminated on March 31, 1999 due to his concerns about health, safety and environmental issues that Foster Wheeler chose to ignore. ALJX 1 at 4; FWX 14.[1] After an investigation, the OSHA Area Director notified the Complainant by letter dated May 7, 1999 that it had determined that his allegations could not be substantiated. ALJX 1 at 2.[2] On May 26, 1999, the Complainant transmitted a facsimile request to the Office of Administrative Law Judges, appealing the Area Director's decision and requesting a formal hearing. ALJX 2.[3]

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[1] The documentary evidence admitted to the record will be referred to as "ALJX" for jurisdictional and procedural documents admitted by the administrative law judge, "CX" for documents offered by the Complainant, "FWX" for documents offered by Respondent Foster Wheeler, and "EBX" for documents offered by Respondent EBA. Citations to the hearing transcript will be designated "TR".

[2] The Area Director's letter states that the Complainant alleged a violation of the Occupational Safety and Health Act of 1970 , 29 U.S.C. §651 *et seq*., in addition to violations of the CAA and CERCLA. The alleged Occupational Safety and Health Act violations are not before me as whistleblowing activities related to occupational safety and health issues are not subject to the Department of Labor's administrative adjudicatory processes but are, instead, governed by section 11 of the Act and enforced in United States Federal District Courts. *Tucker v. Morrison & Knudson*, ARB No. 96-043, ALJ No. 94-CER-1 (ARB February 28, 1997), slip op. at 5. *See also, Reich v. Cambridgeport Air Systems, Inc*., 26 F.3d 1187 (1st Cir. 1994).

[3] The Regulations require that a request for hearing be filed within five business days of receipt of the OSHA determination. 29 C.F.R. §24.4(d)(2). The Claimant testified on cross-examination by counsel to Foster Wheeler that he did not recall when he received the Area Director's May 7, 1999 determination letter, but he was sure that he filed his request for hearing within the five-day time limit because he's "punctual like that." TR 194. Neither Respondent has challenged the timeliness of the Complainant's hearing request. However, assuming that Foster Wheeler's questioning of the Claimant could be construed as raising the timeliness issue, I find that the Claimant's uncontradicted testimony that he transmitted his request by facsimile within five days of receiving the Area Director's May 7, 1999 determination letter is sufficient to meet his burden of establishing that his request was timely filed. *Compare Staskelunas v. Northeast Utilities Co.,* ARB Case No. 98-035, ALJ No. 98-ERA-8 (May 4, 1998), slip op. at 3 (although complainant failed to definitively establish when he received determination letter, request for

Pursuant to notice, a hearing was conducted before me in Boston, Massachusetts on September 27-30, 1999, at which time all parties were afforded an opportunity to present evidence and argument. The Claimant appeared represented by counsel, and an appearance was made by counsel on behalf of Foster Wheeler. EBA was represented by its principal, Gerard J. Burns. Testimony was elicited at the hearing from Surrette and from seven additional witnesses, and documentary evidence was admitted as ALJX 1-12; CX 1-11; FWX 1-9, 12-14,16, 18, 20-22; and EBX 1-3. At the close of the hearing, the record was held open at the request of the Complainant and Foster Wheeler for the submission of post-hearing briefs, and the parties subsequently agreed on December 28, 1999 as the deadline for submission of their briefs. The Complainant and Foster Wheeler both timely submitted post-hearing briefs, and the record was then closed.

## III. Issues Presented

Two basic issues are presented for adjudication: (1) whether Surrette engaged in whistleblower activities protected by the CAA and/or CERCLA; and (2) if he did engage in such activities, whether the Respondents terminated his employment at the Silresim site in retaliation for protected activities or for legitimate, non-discriminatory reasons that are unconnected to the Complainant's protected activity.

## IV. Findings of Fact and Conclusions of Law

A. Background and Employment History

The events in this case took place at a hazardous waste site in Lowell, Massachusetts (the "Silresim"site). As a result of improper storage of hazardous substances on the site in the past, the soil and groundwater became contaminated, necessitating a Federally-financed clean-up. As part of the clean-up process, the United States Army Corps of Engineers contracted with Foster Wheeler to construct and operate a wastewater treatment plant and ground wells on the Silresim site. The wastewater plant pumps contaminated or raw water from the ground wells, removes contaminants to designated safe levels and then discharges the decontaminated or processed water into the City of Lowell municipal sewage system. TR 66-67 (Surrette).

The Complainant, Donald Surrette, came to work at the Silresim site wastewater facility as a plant operator on January 7, 1997, TR 63 (Surrette). He is licensed by the Commonwealth of Massachusetts as a Grade 5-C wastewater treatment plant operator which is valid for both industrial and municipal facilities. TR 63 (Surrette). While the Silresim site job was his first employment in a wastewater treatment facility, Surrette had previous experience as a supervisor for an environmental clean-up firm, and he also worked on the hazardous waste clean-up at the

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hearing received by the Office of Administrative Law Judges more than five days after the mailing date was clearly untimely even if it were assumed that the request was mailed on the date complainant received the determination letter).

W.R. Grace site in Woburn, Massachusetts made famous (or infamous) in print and on screen. TR 64 (Surrette). His duties at the Silresim site wastewater plant included monitoring equipment, making necessary repairs, performing inspections and ensuring that the raw water had been adequately treated prior to its discharge into the municipal system. TR 64 (Surrette). Surrette was hired by EBA, an employment agency which specializes in recruiting and placing licensed engineers, which in turn entered into a contract with Foster Wheeler to provide licensed wastewater treatment plant operators for the Silresim and other sites. EBA paid Surrette at a rate of $19.00 per hour while he was working at the Silresim site. TR 65, 79 (Surrette); 898-899, 929 (Burns).

At the time that Surrette first went to work at the Silresim site, there were four plant operators employed in the wastewater treatment facility. In or around September 1997, there was a reduction from four to three. Surrette survived this reduction and testified that he was told by both John Haley, the Foster Wheeler site manager, and Gerard Burns of EBA that he was retained because he was a better employee than the operator who was laid off at this time. TR 69, 541-42.

Surrette was less fortunate six months later in March 1998 when there was a further staff reduction to two full-time plant operators, and he was laid off. This reduction occurred when the government reduced the number of hours the plant had to have operators present, and Surrette's employment was terminated because he was a temporary employee while the other two operators were full-time employees of a subcontractor. TR 67 (Surrette); 658-60 (Haley). While Surrette's temporary status appears to have been the reason he was laid off at this time, Haley and Burns both testified that Foster Wheeler was not completely satisfied with Surrette's performance. In particular, Haley stated that he would find things out of place in the plant after Surrette's night shift, TR 638-39, that Surrette did not at times complete assigned tasks, TR 650-51, that Surrette had problems with him because he (Haley) was younger, TR 653, and that he was particularly disappointed by the lack of initiative taken by the plant operators on the overnight shift, including Surrette. TR 805. Burns testified that Haley discussed these issues with him during Surrette's initial period of employment at Silresim and that it was his assessment of Surrette's performance that "[n]othing was remarkably good about his performance but nothing remarkably bad." TR 886. There is no evidence that Surrette was ever counseled or warned in regard to his performance, and EBA did not maintain any record documenting Surrette's performance deficiencies. TR 887 (Burns).

After his lay-off in March 1998, a plant operator position at the Silresim site became available during the Summer, and Surrette was reemployed through EBA in July 1998. He was assigned to a Monday-Friday, 10:00 a.m. to 6:00 p.m. shift, and he was paid at the rate of $19.00 per hour. TR 79 (Surrette). Haley testified that he was very reluctant to bring Surrette back to the Silresim plant because of his past concerns with Surrette's job performance and his unwillingness to work with others, but he needed a replacement operator quickly and had difficulty in finding qualified operators. TR 671-72, 674-77. Burns similarly testified that he and Haley came to the conclusion that Surrette was not their first choice and that they should seek

alternative candidates. However, he stated that he was unable to offer other viable candidates, and Haley agreed to take Surrette back with the understanding that EBA would continue to look for another operator. TR 894-96. Regarding EBA's efforts to find an alternative to Mr. Surrette, Burns testified that he placed a employment advertisement in the August 9, 1998 edition of the Boston Sunday Globe which listed several jobs including an environmental technician/wastewater operator position which he identified as the position to which Surrette had been assigned at Silresim. TR 905-06, 921-22; EBX . Burns subsequently submitted an application for membership in the Massachusetts Water Pollution Control Association on February 18, 1999 and included with his application an announcement for a wastewater treatment plant operator position at the Silresim site. TR 896-97 (Burns); EBX 3. There is no evidence that any of the performance deficiencies attributed to Surrette were ever brought to his attention or that he was made aware of Haley's reservations about rehiring him at any time prior to his termination on March 27, 1999. Surrette continued to work in the wastewater treatment plant at the Silresim site until March 26, 1999. On the morning of March 27, 1999, he received a call from Burns who told him that his employment at Silresim had been terminated because he refused to attend a mandatory safety meeting on the previous day. TR 134-35 (Surrette).

Surrette denies that he refused to attend any mandatory meeting, and he alleges that he was terminated in retaliation for engaging in activities protected by the CAA and CERCLA. Foster Wheeler and EBA contend that Surrette did not engage in any whistleblower activity protected by the CAA or CERCLA and that, even if he did, his termination was based on legitimate, non-discriminatory reasons which are unrelated to any protected activity.

B. The Merits

In order to present a *prima facie* case of unlawful retaliation or discrimination under the CAA and CERCLA, the Surrette must show that he engaged in protected activity, that the Respondents subjected him to adverse action, that the Respondents were aware of the protected activity when it took the adverse action. As the complainant, Surrette must also present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. *Holtzclaw v. United States Environmental Protection Agency*, ALJ No. 95-CAA-7 (ARB February 13, 1997), slip op. at 3-4.

1. Did Surrette Engage in Protected Activity?

Surrette testified that he brought health and safety issues to the attention of Foster Wheeler management on several occasions between January 1997 and March 1998. He described incidents where a groundwater well sampling crew returned contaminated air supply equipment to the plant, and he stated that he had expressed concerns to management that members of the well sampling crew would walk through the plant wearing contaminated clothing and equipment that had not been cleaned in accordance with proper decontamination procedures. TR 70-73. Surrette testified that he addressed his concerns in this regard to Burns, Haley and Army Corps of Engineers personnel at the Silresim site. He also stated that he had considered filing a complaint

with the OSHA or the Environmental Protection Agency ("EPA") but did not do so because he considered the matter to be an "in-house" problem. TR 74-75. Surrette has not alleged that expression of these concerns during the initial period of his employment at the Silresim site were protected by the CAA or CERCLA, and he has not alleged that his actions in expressing these concerns played any role in the decision to terminate his employment in March 1999.

During Surrette's second tour of duty as an operator at the Silresim wastewater treatment plant, he made internal complaints concerning three incidents which he asserts constitute activities protected under the CAA and CERCLA. These incidents occurred on September 10, 1998, November 1, 1998, and February 17, 1999. He also filed a complaint with the EPA after his employment at Silresim was terminated.

*The September 10, 1998 Odor Incident*

The first incident occurred on September 10, 1999 and involved an odor emanating from the area of the metal removals system (MRS) tank in the plant that had persisted for several days. Surrette testified that he developed a headache and found the odor offensive, so he complained to two Foster Wheeler safety inspectors, Peter Vernon and Lee Dickson, and requested that they take some type of reading to see what the concentration level was at that time in the plant. TR 80-81. According to Surrette, Vernon indicated that he had taken readings in the past and they were "not that bad", and Dickson responded that it was only the Silresim odor. TR 84. Surrette further testified that he had been advised by the chief plant operator, Steve Daigle, when he first got to work on September 10 that Daigle had taken a reading which was "something like 50 parts per million" (PPM) and to avoid the area. TR 80, 90. Regarding this reported reading, Surrette stated 50 PPM exceeded the plant's allowable limits which should have resulted in the plant being evacuated. TR 88-89. However, he stated that Daigle did not record this reading in the plant log, and he described this as a "typical omission." TR 90-91. Surrette also testified that Frank Zizzo, another Foster Wheeler employee, had taken a reading near the MRS tank at his request and reported that he had obtained a reading of 8.3 PPM on the ladder leading to the top of the MRS tank and that the readings were climbing. TR 84-85 (Surrette). Although the odor was contained within the plant building, Surrette testified that several Foster-Wheeler employees, including Joseph Francis, walked in and out of the plant, TR 90-91, and he stated that he had learned through "hearsay" that Francis had taken readings in excess of 10 PPM. TR 94. Surrette stated that he reported the incident to Haley within a day or two, but he did not file any formal report or complaint. TR 93-94, 96. He also stated that he went to see his own physician because he felt "nauseated, dizzy headache [and] my sinuses were acting up." TR 96. Regarding his medical condition, Surrette introduced a statement dated March 31, 1999 from a physician at the Department of Veterans Affairs Clinic in Lowell stating that Surrette had been under the physician's care since July 9, 1998 for chronic rhinitis with a diagnosis of squamous metaplasia of the nose secondary to chemical irritation. The physician attributed the probable cause of this condition to exposure to volatile waste agents. CX 11. It was subsequently discovered that the odor was due to a corroded valve on the MRS tank which Surrette and Francis repaired without wearing protective clothing. TR 97-98 (Surrette).

*The November 3, 1998 Dirty Respirator Incident*

On November 3, 1998, Surrette entered the plant control room, which he described as a designated "clean room", and discovered that two Foster Wheeler employees had entered the area, still wearing their "Level B" protective suits, and had placed "contaminated" respirators on one of the chairs in the control room. TR 98-99 (Surrette). Surrette reported this incident by calling Benjamin Daniels who was employed by a Foster Wheeler subcontractor and who was located in the Foster Wheeler trailer on the Silresim site. TR 99-100 (Surrette). Surrette testified that Daniels came to the plant, picked up the respirators, stating that they were not contaminated, and proceeded to wash them in a sink. Surrette disagreed and pointed out that he could tell that the respirators were contaminated because they were wet and, like the protective suits worn by the two employees, covered with soil smudges, thus indicating the presence of contamination because the two employees had been taking samples of contaminated water from the wells. TR 101-102. According to Surrette, there are a minimum of 100 contaminants and carcinogens present on the Silresim site, and he was concerned because the employees had contaminated the control room and exposed him and every person in the control room to contamination. TR 102. Not satisfied with the assurances offered by Daniels, Surrette testified he reported the incident to Bums and that he believes he also reported the incident to Mr. Haley. TR 102-103. Surrette testified that Bums told him that he would talk to Haley about the incident; however, he could not recall receiving particular response or any action being taken other than Haley possibly stating that the respirators were not contaminated and that the two employees were just doing their jobs. TR 103-106. He added that he thought about filing a complaint with the EPA over this incident but did not. He also stated that he had several discussions with Daigle, the chief operator, about his concerns and how it seemed that Foster Wheeler had two sets of rules, one for its own employees and another for everyone else. TR 106.

*The February 17, 1999 Heat Exchanger Test Incident*

The third incident occurred on February 17, 1999 when Surrette was left alone in the plant for a period of time while testing of a heat exchanger was being conducted to determine whether performance could be improved by raising the temperature of the processed water. TR 115 (Surrette). Surrette testified that around 11:30 a.m., he noticed that he was the only one in the plant and that the heat exchanger had exceeded its safe operating limits:

> [A]bout 11 or 11:30 or so I noticed I was the only one around and at that time the – the heat exchanger had exceeded its safe limit by something like 35 degrees. It had – the pressure exceeded the requirements. At that time the gauge needle was pegged all the way over to 60 PSI. I became very concerned because I had two – two unsafe conditions confronting me. One was the excessive heat which could cause an equipment breakdown or the pressure which could cause an equipment malfunction or breakdown . . .

TR 115-16. Surrette explained that normal operating temperature was about 130 degrees

Fahrenheit, that he had been verbally instructed that the test was going to raise the temperature to around 150 degrees, and that normal operating pressure is around 40 or 42 PSI, TR 116-17, 119-21. He stated that when he discovered that the temperature had risen to 185 degrees and that the pressure had increased to a level in excess of 60 PSI, the maximum on the gauge, Francis and the other Foster Wheeler employees had gone to lunch. TR 117-121. Because he was alone and considered the situation to present imminent danger of spilling contaminated hot water and gas, he took steps to lower the temperature and pressure. TR 120-21. Surrette further testified that he called Burns and told him that he did not think that it was right that he had been placed in a dangerous and hazardous situation and that "next time there's a good possibility I'd just walk off the site because I'm not going to place my life in jeopardy because of some stupid thing like this." TR 122. He also prepared a memorandum which he personally delivered to Haley later that day. TR 123. The memorandum, which is dated February 17, 1999, states,

> Mr. Haley I am bringing to your attention a serious event that occurred today. The Plant was conducting an heat exchanger test, to see if it was feasible to increase the process water temperature to improve the efficiency of the Air Stripper. During this testing the process water was increased to temperatures of over 185 degrees Fahrenheit. These temperatures exceeded the working conditions of the various components and posed a serious and unsafe condition. These conditions were worsened by three Foster Wheeler employees who left the plant and the site for over an hour. This absence left me (Plant Operator) without any security or safety backup. There was no Security Guard present at the F.W. Trailer, nor was there any secretary present. To sum this up I was left entirely alone on the whole site for over an hour. This placed me in a dangerous and unsafe position that could have resulted in injury and/or damages. Faced with this condition I took steps to alleviate these hazardous conditions and lowered the high temperatures back to the safe operating limits. Upon his return I informed Joe Francis of the circumstances I was faced with. I would appreciate if you would give this matter your immediate attention and kindly inform me of your recommendations, if any. Thank you for your time and consideration in this matter.

CX 5. Surrette also testified that he discussed the incident with Haley when he delivered his memorandum. According to Surrette, Haley said something to the effect that he would change the rules from the prior "buddy system" so that sometimes the operator could be left alone. TR 124. Surrette testified that he did not consider the matter resolved because, "I felt very uncomfortable about that decision because, once again, it seemed like being a non-Foster Wheeler employee, my health and safety did not matter." TR 124-25. He stated that he expressed his concern over this perceived lack of concern to Burns and that he considered bringing the incident to the attention of the EPA and, possibly, OSHA. TR 125.

*The EPA Complaint*

A few days after he was notified by Burns on March 27, 1999 that his employment at the

Silresim site was terminated, Surrette called the EPA to lodge a complaint against Foster Wheeler. TR 136, 186, 418 (Surrette). Specifically, Surrette testified that he complained to the EPA that Foster Wheeler had discharged "off-gasses" from the Silresim plant into the atmosphere through an unfiltered exhaust pipe and that it had stored barrels containing contaminated sludge in excess of the Silresim site's capacity. TR 136-39. Although Surrette thinks that he mentioned the unfiltered exhaust pipe to Daigle, the chief operator, he acknowledged that he had not raised either of the issues addressed in his EPA complaint with Haley. TR 136-37, 418.[4] After he contacted the EPA to raise these issues, Surrette testified that he received a call from Burns:

> A. Yes, I did. I think it was the following Wednesday Mr. Burns called me up and I could tell by the tone of his voice he was quite angry at me. He had found out that I had filed a complaint with the EPA concerning some of the conditions at the Silresim site and he threatened – you know, I felt like it was a threat. He said, "Don't you ever do that again. Don't you file anything or take any actions against Foster Wheeler."
>
> Q. Did he tell you that you didn't have the right to call the EPA?
>
> A. That's right. Then he said, you know, "You're going to be sucking off my unemployment," you know. Words to that effect. He was – he was extremely angry.

TR 135-36. Surrette further testified that it subsequently became clear to him that EBA was not going to place him in another position. TR 186.[5]

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[4] The record reflects that the Army Corps of Engineers investigated Surrette's complaints and reported to the EPA that there was no discharge of untreated or unfiltered gasses from the Silresim plant and that there had not been any storage of waste barrels in excess of any applicable regulation. FWX 13. It appears that no further action was taken on Surrette's complaints.

[5] I note that Surrette's testimony, if credited, that Burns was angry over the filing of the EPA complaint and subsequently did not place Surrette in jobs could support a discriminatory refusal to hire allegation against EBA. However, Surrette did not include a refusal to hire allegation in his complaint, and he did not move to amend the complaint to include such an allegation. Moreover, no evidence has been introduced concerning the requisite elements of a refusal to hire case; that is whether (1) Surrette applied and was qualified for a job for which EBA was seeking applicants, (2) despite his qualifications, he was rejected and (3) after his rejection, the position remained open and EBA continued to seek applicants from persons of complainant's qualifications. *See, Samodurov v. Niagara Mohawk Power Corp.*, ALJ No. 89-ERA-20 (Sec'y November 16, 1993), slip op. at 6-7, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802(1973). Under these circumstances, I conclude that the issue of whether EBA refused to hire Surrette for other jobs because he filed an EPA complaint has not been tried by implied consent and is not properly before me. *C.f., Yellow Freight System. Inc. v. Martin*, 954 F.2d 353, 358-59 (6th Cir.1992) (unpleaded issue may be tried by implied consent); *MacLeod v. Los Alamos*

*Other Incidents*

Surrette described two other incidents where he made complaints while working at the Silresim site. The first of these incidents occurred on February 1, 1999 when he complained that Haley had signed him out when he left during his shift for a doctor's appointment. The second occurred on or about March 24, 1999 when he complained to Burns about his not being assigned responsibilities as a plant operator. Both incidents served to solidify Surrette's perception that he was being singled-out by Foster Wheeler for adverse treatment. Although Surrette does not contend that either of these complaints is protected under the CAA or CERCLA, they are described herein so that his asserted protected activities can be considered in their appropriate factual context.

Regarding the events of February 1, 1999, Surrette testified that he left for a doctor's appointment during his shift without signing out but after notifying Daigle that he would be leaving. Upon his return, Surrette stated that Haley "kind of chewed me out for leaving as I did and told me from that moment on that I would be required to sign in and sign out for the period that I was gone at the doctor . . . [and] that he was going to make all the employees sign in and out." TR 107. Surrette further testified that he pointed out to Haley that the practice at Silresim had been for employees to sign in at the beginning of their shift and when they went home at the end of the shift but not if they left during the shift for lunch, to which Haley reportedly responded, "Different rules for different people." TR 108. This exchange prompted Surrette to write the following to Haley in a memorandum dated February 2, 1999 with a copy to Burns:

> On February 1, 1999 you brought to my attention that you will be requiring all personnel to sign in and out, at the Foster Wheeler trailer whenever personnel are arriving or leaving the Silresim site. You had signed me out at 1330 hours, you also required that I sign in again. You stated that you would extend and enforce this requirement to everyone, including yourself.
>
> Today I am notifying you that neither compliance nor enforcement is being made on this requirement. Foster Wheeler personnel have been arriving and leaving the Silresim site without signing out or in after their initial arrival.
>
> In addition, I am informing you that I will continue to monitor this requirement, and any future violations of this requirement will be interpreted as singling me out This singling me out is a form of punishment that I will not tolerate. Future violations, including lack of enforcement will result in my notification of appropriate agencies and seeking relief from prosecution.

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*National Laboratory*, ARB No. 96-044, ALJ No.94-CAA-18 (ARB April 23, 1997), slip op. at 6-7.

CX 4; TR 109-110. Surrette said that he spoke to Burns about his February 2, 1999 memorandum, and he recalled that Burns stated that he could have been fired for the language he had used without specifying any particularly offending words. TR 110-111. Surrette testified that he also had a conversation with Haley who stated that he had shown the memorandum to people in Foster Wheeler's Boston office who all were of the opinion that Surrette should be fired. Surrette stated that he responded that perhaps he should file a complaint because he was being discriminated against, and Haley retorted that if he did [file a complaint] he would be fired. TR 113.

The second complaint arose from Mr. Surrette's perception that Foster Wheeler was discriminating against him by not assigning certain responsibilities which he considered part of his duties as a wastewater treatment plant operator. His perception in this regard was triggered by a March 19, 1999 memorandum which Joe Francis issued summarizing the results of an inspection of the Silresim plant. In this memorandum, Francis established a rotation of individuals responsible for weekly "walk-through" inspections of the plant, and he assigned individuals specific responsibility for ensuring that corrective actions were taken on conditions found to be deficient during the inspection. CX 6 at 2-5. Surrette is not listed in the rotation for the weekly inspections, and he was not assigned responsibility for taking any of the listed corrective actions. This omission prompted him to write the following in a letter to Burns dated March 24, 1999:

> You are hereby notified that I am providing you with information that Foster Wheeler is engaged in acts of discrimination and unfair labor practices against me. As further proof that Foster Wheeler has continued its acts of discrimination and unfair labor practices against me I am forwarding to you four pages dictating the responsibilities of all permanent and temporary on-site Silresim personnel, except me. Despite having the education, knowledge, and experience, I am deprived of any and all responsibilities in the performance of my duties as a Waste Water Treatment Plant Operator with a State of Massachusetts Grade 5-C license. Your continued failure to recognize the conditions created by Foster Wheeler in the past suggests, to me, that you are in agreement with this policy of Foster Wheeler.

CX 6. Surrette testified that he had previously been assigned responsibility for conducting plant inspections as part of his duties as an operator. He also testified that the March 19, 1999 Francis memorandum was the only notice he ever received that he was no longer going to be assigned responsibility for inspections and that he never was given any explanation as to why he was not given any of the responsibilities set forth in the Francis memorandum. TR 148-49.

Surrette was questioned extensively at the hearing regarding the concerns underlying his complaints. In response to this questioning, he testified that none of his pre-termination complaints raised issues covered by either the CAA or CERCLA and that he did not believe that any of his complaints concerned violations of these environmental acts:

> Q. Mr. Surrette, on cross-examination I believe you testified that you

didn't raise anything to Mr. Haley you believed was a CERCLA violation. Correct?

A. Yes.

Q. And you [didn't] raise anything to Mr. Haley that you believed was a Clean Air Act violation?

A. Yes

Q. You raised the three incidents that your Attorney just mentioned because you felt that they were health and safety issues. Correct? You were concerned for your health and safety?

A. Yes.

Q. Okay. And with regard to Mr. Burns, you didn't raise any claims that you felt were CERCLA violations to Mr. Burns. Did you?

A. No.

You didn't raise any claims that you thought were violations of the Clean Air Act to Mr. Burns. Did you?

A. No.

* * * * *

Q. I believe you testified both on cross and recross that the reason you were raising these complaints, the three that Mr. Raymond just asked you about, is because you thought they were health and safety violations and potentially put you at risk. Correct?

A. That's correct.

Q. And I believe [you] testified to me that you didn't believe necessarily that these were violations of the Clean Air Act?

A. That's correct.

Q. And that you didn't necessarily believe that these were violations of the CERCLA. Correct?

A. Yes.

Q. And that you raised these issues because you believed they were health and safety violations?

A. Yes.

TR 526, 545-46. Surrette did testify that he believed a leak of contaminated gasses from the plant would constitute a violation of the CAA. TR 543. However, he stated that he never told Haley or Burns that he thought that there was any violation of either the CAA or CERCLA or that he was going to file a complaint of a violation, and he acknowledged that he did not know whether any of the incidents he'd witnessed at Silresim specifically violated either the CAA or CERCLA. TR 523-24, 543-44. Surrette further acknowledged that, in addition to being based on concerns over his personal health and safety, his internal complaints were based on his perception that Foster Wheeler treated employees of subcontractors differently from its own employees and that it was less concerned for the health and safety of subcontractor employees. TR 357, 359, 386-88, 400-404.

Foster Wheeler contends that Surrette's complaint must be rejected because his internal pre-termination complaints raised only concerns over his personal health and safety and were not grounded in conditions constituting reasonably perceived violations of the CAA or CERCLA. Foster Wheeler Brief at 3-10. Surrette concedes that his pre-termination complaints were based on his belief that his health and safety were being jeopardized. However, he maintains that his expressions of personal safety concerns are nonetheless protected by the CAA and CERCLA because there is an "inevitable overlap between safety concerns and environmental concerns." Surrette Brief at 9, quoting *Jones v. EG & G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3 (ARB September 29, 1998), slip op. at 10, *appeal pending sub nom. EG & G Defense Materials, Inc. v. U.S. Dept. of Labor*, No. 99-9501 (10th Cir.). After careful review of the record in this matter and the pertinent case law, I conclude that Surrette's complaints, with the exception of his post-termination complaint to the EPA, are not protected by either the CAA or CERCLA.

The protections afforded by the whistleblower provisions of environmental acts such as the CAA and CERCLA apply to activities which are grounded in conditions constituting reasonably perceived violations of the environmental statutes. *Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos. 95-CAA-20, 21 and 22 (ARB September 30, 1999), slip op. at 8-9; *Crosby v. Hughes Aircraft Co.*, ALJ No. 85-TSC-2 (Sec'y August 17, 1993), slip op. at 26, *aff'd sub nom. Crosby v. U.S. Dept. of Labor*, 53 F.3d 338 (9th Cir. 1995) (table); *Tyndall v. U.S. Environmental Protection Agency*, ALJ Nos. 93-CAA-6, 95-CAA-5 (ARB June 14, 1996), slip op. at 5-6; *Johnson v. Old Dominion Security*, ALJ No. 86-CAA-3 (Sec'y May 29, 1991), slip op. at 15. Thus, it is well-established that there are jurisdictional limits to the environmental acts and that the protective reach of the whistleblower protection provisions is not so broad as to encompass every employee complaint arising from conditions in a place of employment that is

subject to environmental legislation and regulation. *Minard v. Nerco Delamar Co.*, ALJ No. 92-SWD-1 (Sec'y January 25, 1994), slip op. at 6 (environmental whistleblower provisions are intended to apply to environmental concerns and not to other types of concerns); *DeCresci v. Lukens Steel Co.,* ALJ No. 87-ERA-13 (Sec'y December 16, 1993), slip op. at 4.

The necessity of drawing a jurisdictional distinction between the raising of protected environmental concerns and unprotected complaints grounded in other concerns was specifically addressed in regard to employee health and safety complaints by the Secretary of Labor in *Aurich v. Consolidated Edison Company of New York, Inc.*, ALJ No. 86-CAA-2 (Sec'y April 23, 1987), where the ccomplainant alleged that he had been fired for complaining about the manner in which his employer handled asbestos in the workplace. In remanding the case to the ALJ for further consideration, the Secretary held that a complaint that an employer handled asbestos in a manner which violated EPA regulations on release of asbestos into the surrounding air is covered by the whistleblower provisions of the CAA, but that safety complaints limited to airborne asbestos as an occupational hazard are not protected by the CAA:

> Whether or not the CAA governs the air inside a workplace, pursuant to that statute, the Environmental Protection Agency has regulated the manner in which asbestos is handled within workplaces during, among other things, renovation, to prevent emissions of asbestos to the outside air. *See* 40C.F.R. Chapter 61, Subpart M, §§ 61.146 and 61.147(1986). If Complainant has complained that one or more provisions of these regulations had been violated by Respondent, such complaints would appear to be protected under 42 U.S.C. §7622(a). On the other hand if Complainant's complaints were limited to airborne asbestos as an occupational hazard, the employee protection provision of the CAA would not be triggered. In the converse of the situation in this case, the Occupational Safety and Health Administration has issued regulations which give a broad scope to the employee protection provision of the Occupational Safety and Health Act, 29 U S.C. §660(c)(1982), protecting complaints with other Federal, State or local agencies regarding occupational safety and health. But "[s]uch complaints . . . must relate to conditions at the workplace, as distinguished from complaints touching only upon general public safety and health." 29 C.F.R. §1977.9(b) (1986). I think a complementary approach is applicable to the scope of 42 U.S.C. §7622(a). Any complaints regarding effects on public safety or health, or concerning compliance with EPA regulations, under the CAA, are protected under the CAA, but those related only to occupational safety and health are not.

Slip op. at 3-4. In *Tucker v. Morrison & Knudson,* ARB No. 96-043, ALJ No. 94-CER-1 (ARB February 28, 1997) the Administrative Review Board ("ARB") similarly observed:

> The distinction between complaints about violations of environmental requirements and complaints about violations of occupational safety and health requirements is not a frivolous one. Worker protection for whistleblowing activities related to occupational safety and health issues is governed by Section 11 of the Occupational and Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), and enforced in United States Federal District Courts, not within the Department of Labor's administrative adjudicatory process.

Slip op. at 5. Under this approach, complaints raising general safety concerns have been found

protected under environmental acts where they also touched on general environmental concerns. *See, e.g., Jones v. EG & G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3 (ARB September 29, 1998), slip op. at 10, *appeal pending sub nom. EG & G Defense Materials, Inc. v. U.S. Dept. of Labor*, No. 99-9501 (10th Cir.); *Hermanson v. Morrison Knudson Corp.*, ALJ No. 94-CER-2 (ARB June 28, 1996); *Nathaniel v. Westinghouse Hanford Co.*, ALJ No. 91-SWD-2 (Sec'y February 1, 1995); *Minard v. Nerco Delamar Co.*, ALJ No. 92-SWD-1 (Sec'y January 25, 1994); *Scerbo v. Consolidated Edison Co. of New York, Inc.*, ALJ No. 89-CAA-2 (Sec'y November 13, 1992).

In *Jones v. EG & G Defense Materials*, the ARB agreed with the ALJ's finding that many of the complainant's activities and complaints were protected under the environmental statutes "because they pertained generally to the risk of an emission of toxic substances from a dangerous instrumentality, *i.e.*, an incinerator for destroying military chemical agents (including nerve gas)." Slip op. at 11. Specifically, the ARB held that the complainant raised four concerns that were protected: (1) a concern about a military chemical agent being vented directly into the atmosphere and the lack of charcoal filters; (2) a report of a leaking hydrogen cannister in a toxic chemical storage area to the fire department based on the complainant's concern that the leaking hydrogen, a highly flammable substance, could result in an explosion and release of toxic chemicals into the environment; (3) noting in an internal audit that there was a deficiency in the facility's emergency preparedness plan; and (4) making a report to his superiors regarding the necessity of a hazard analysis which likely would lead to repairs or changes in the plant thereby diminishing the likelihood of a release of toxic chemicals into the atmosphere. *Id.* at 12-14.[6]

In *Hermanson v. Morrison Knudson*, the complainant spoke to a state regulatory agency engineer about a spill of waste material from a drum into an area of gravel. Slip op. at 3. The ARB held that the complainant's statement to the state engineer "confirming that a spill had

[6] The ARB did not hold that there is an "inevitable overlap"between safety and environmental concerns, as suggested by Surrette in his brief. That quotation was taken from the complainant's brief. *Id.* at 10-11.

occurred was a clear indication that further investigation of the incident was necessary, and thus was protected under CERCLA." *Id.* at 6.

The complainant in *Nathaniel* v. *Westinghouse Hanford*, a chemical scientist employed by a contractor working on the clean-up of a "Superfund" site, complained about the perceived health (radiation) and safety (explosion) hazards occasioned by a co-worker's refusal to conduct personal radiation monitoring and smoking in a non-smoking area. Slip op. at 2. Noting that the complainant was concerned that an explosion could have resulted in emission of dangerous chemicals and radiation into the environment in violation of the CAA and subject to disclosure under the CERCLA, the Secretary found that the complaint touched on matters covered by the environmental statutes and was, therefore, protected. Slip op. at 4.

In *Minard* v. *Nerco Delamar*, the employee complained about the dumping of anti-freeze into a tailings pond and a spill of 100 gallons of oil on the ground, concerns which the Secretary found to touch on the environment. Slip op. at 2, 6. And, in *Scerbo v. Consolidated Edison*, an employee made internal and external complaints about the release of asbestos and crystalline silica into the atmosphere and participated in a regulatory inspection. The Secretary held that the employee's complaints "touched on" public safety and health, the environment, and compliance with the CAA and, thus, were protected by the CAA. Slip op. at 4-5.

On the other hand, consistent with *Aurich v. Consolidated Edison*, complaints that are limited solely to an occupational hazard have been found to be unprotected under the environmental acts. Thus, in *Tucker v. Morrison and Knudson*, the ARB rejected the ALJ's finding that complaints about a co-worker's violation of occupational safety rules were not protected under the environmental whistleblower provisions because the complaints related to *occupational* rather than *environmental* safety. Slip op. at 4-6. And, in *DeCresci v. Lukens Steel*, an analogous case brought under whistleblower protection provisions of the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. §5851, the Secretary held that the complainant's actions in rejecting construction welds and reporting failure to follow proper procedures in the construction of sonarspheres were not related to nuclear or radiation safety and, consequently, were not protected by the ERA. Slip op. at 4.

In my view, all of Surrette's pre-termination complaints, like the complaints in *Tucker v. Morrison and Knudson*, are limited to occupational hazards and, more particularly, Surrette's personal health and safety, as distinguished from concerns which touch on public health and safety, the environment or compliance with the CAA or CERCLA. In arriving at this conclusion, I am persuaded not just by Surrette's admissions at the hearing that his complaints arose from concerns over his own health and safety rather than any concern that the complained-of incidents

involved violations of the CAA or CERCLA,[7] but by the factual context in which he raised these concerns. *See, Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1575-76 (11th Cir. 1997) (emphasizing the importance of considering employee complaints in their full factual context when determining whether the complaints are protected under the ERA). In this regard, I find it particularly revealing that Surrette described several conditions at the Silresim site which on their face appear to raise larger concerns of public health and safety and injury to the environment, yet he never made any complaint concerning these conditions until after he was terminated. In addition to the matter of the previously-discussed allegations concerning the venting of unfiltered gasses into the atmosphere and storage of excess sludge barrels which he raised for the first time in his post-termination complaint to the EPA, Surrette testified that he had witnessed Daigle repeatedly manipulate the results of testing performed on effluent discharged from the plant into the municipal sewage system and that Daigle falsified records, but he never informed Haley or made any protest because he empathized with Daigle as a subcontractor employee and didn't want to see him get hurt. TR 210-226. Interestingly, Surrette's professed concern for Daigle, which he asserts was so strong that he kept quiet for years about the manipulation of test results, falsification of records and apparent discharge of improperly treated effluent into the municipal wastewater system, dissipated by the time of the hearing to the point that Surrette voluntarily disclosed a pattern of misconduct which, if true, could potentially expose Daigle and others to civil and criminal penalties. *See generally, United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997) (discussing civil and criminal penalties under the Federal Clean Water Act and Federal Water Pollution Control Act Amendments of 1972 for unlawful discharge of industrial wastewater into a storm sewer).[8] I find Surrette's offered explanation for his silence palpably incredible. Instead, it is reasonable to infer from the totality of evidence in this record that Surrette did not raise any concern over Daigle's alleged misdeeds during the period of his employment at Silresim because manipulation of test results, falsification of records and discharge of contaminants into a public sewage system, like the venting of unfiltered gasses into the atmosphere and stockpiling of excess waste barrels, did not pose any perceived threat to Surrette's personal health and safety. Viewed in this context, it is abundantly clear that Surrette's complaints regarding the odor in the plant, the presence of dirty protective equipment in the control room and his being left alone during the heat exchanger testing did not touch on public health and safety, environmental concerns or reasonably perceived violations of the CAA or

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[7] I have not relied on Surrette's unfamiliarity with the CAA and CERCLA or his inability to specify whether any conditions covered by his complaints violated the environmental acts since a complainant's inability to specify the controlling EPA regulations is not determinative of whether the complainant engaged in protected activity. *Oliver v. Hydro-Vac Services, Inc.*, ALJ No. 91-SWD-1 (Sec'y November 1, 1995), slip op. at 5.

[8] It is noted that the Secretary has held that an allegation of record falsification by a water treatment plant operator, whose duties included treatment of water so it could be released in accordance with state regulations, was sufficient to show a reasonably perceived violation of the Federal Water Pollution Control Act, 33 U.S.C. §1367. *Carson v. Tyler Pipe Co.,* ALJ No. 93-WPC-11 (Sec'y March 24, 1995), slip op. at 5.

CERCLA. Accordingly, I conclude that none of Surrette's pre-termination complaints are protected under the CAA or CERCLA because they were limited to occupational rather than environmental safety.

Since Surrette has not met his burden of proving that he engaged in activity protected by the CAA or CERCLA, he can not establish that his employment was terminated in retaliation for activities protected by the environmental whistleblower provisions of those acts.[9]

## V. Recommended Order

It is recommended that the complaint of Donald Surrette against the Foster Wheeler Environmental Corporation and Edward Black Associates under the Clean Air Act and the Comprehensive Environmental Response, Compensation and Liability Act be dismissed.

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Daniel F. Sutton
Administrative Law Judge

Camden, New Jersey

**NOTICE**: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[9] While there is no dispute that Surrette's complaint to the EPA is protected, there is also no dispute that this activity, occurring as it did after his termination, played no role in the termination decision. *See, Bailey v. System Energy Resources, Inc.,* ALJ Nos. 89-ERA-31 and 32 (Sec'y July 16, 1993), slip op. at 4.